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To Arbitrate or Not to Arbitrate - The Protection of Rights under the Age Discrimination in Employment Act - Steck v. Smith Barney, Harris Upham & (and) Co.

Thomas D. Rodenberg

NOTES

TO ARBITRATE OR NOT TO ARBITRATE? THE PROTECTION OF RIGHTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Steck v. Smith Barney, Harris Upham & Co.[1]

I. INTRODUCTION

The attempt to compel arbitration in a dispute involving federal statutory rights given judicial protection brings into tension two firmly established national policies. On one side, there is the national policy as set forth in the Federal Arbitration Act[2] (hereinafter Arbitration Act) which strongly favors arbitration agreements.[3] On the other side, there is the national policy of providing broad access to the courts as the means of enforcing certain statutorily granted rights.[4] The tension is created when an individual bound by an arbitration agreement raises a claim based on a federal statutory right which is

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1. 661 F. Supp. 543 (D. N.J. 1987).

2. 9 U.S.C. §§ 1-14 (1947).

3. The Arbitration Act itself embodies this strong national policy. The Arbitration Act mandates that a privately made agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2. The Arbitration Act further provides that a court must stay its proceedings pending arbitration if it is convinced the issue involved is arbitrable. *Id.* at § 3. The Arbitration Act directs the court to issue an order requiring the parties to arbitrate upon being satisfied that one party has failed, neglected, or refused to arbitrate in contravention of a valid arbitration agreement. *Id.* at § 4.

4. Congress has enacted various statutes granting judicially enforceable rights. For instance, Title VII of the Civil Rights Act (hereinafter Title VII) assures equality of employment opportunity by eliminating discrimination in the workplace, and vests final enforcement of its provisions in the courts. 42 U.S.C. §§ 2000e-2, 2000e-3, 2000e-5(f) (1964). The Fair Labor Standards Act (hereinafter FLSA) guarantees individual workers minimum wage and hour protection, and grants broad access to the courts for enforcement. 29 U.S.C. §§ 206, 207, 216(b) (1967). The Employee Retirement Income Security Act (hereinafter ERISA) protects employees from interference with their statutory and private employer benefit plans, and provides for enforcement of its provisions in the federal courts. 29 U.S.C. §§ 1140, 1451 (1974).

judicially protected. This is precisely the tension faced by the district court of New Jersey in *Steck v. Smith Barney, Harris Upham & Co.*[5] The court faced the issue of whether a claim under the Age Discrimination in Employment Act[6] (hereinafter ADEA) could be compelled to arbitration under the Arbitration Act.[7] The court concluded that the plaintiff's claim under the ADEA was nonarbitrable, despite its finding that the claim fell within the scope of the arbitration agreement.[8] The court reached this conclusion by examining the text and legislative history of the ADEA and judicial precedent involving analogous statutory schemes.[9]

II. BACKGROUND

The court in *Steck* faced two imposing precedents as it considered the case. The first related to the tension previously mentioned. If the court found the claim nonarbitrable, it would be forced to justify abandoning the strong national policy in favor of arbitration agreements. The second precedent came from the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[10] The Supreme Court therein set forth the general rule that there is no presumption against arbitration of statutory claims in the Arbitration Act.[11] The Court concluded that a party who agrees to arbitrate is bound to do so unless Congress indicates an intent to preclude a waiver of judicial remedies in the statute itself.[12] In light of *Mitsubishi*, the court in *Steck* would be forced to find the necessary Congressional intent in order to conclude the statutory claim was nonarbitrable.

A. *The Tension*

The Arbitration Act was passed in 1924 in response to the longstanding refusal by the courts to enforce privately made arbitration agreements.[13] The

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5. 661 F. Supp. at 543.
6. 29 U.S.C. § 621-634 (1967).
7. *Steck*, 661 F. Supp. at 543.
8. *Id.* at 545, 547.
9. *Id.* at 547.
10. 473 U.S. 614 (1985).
11. *Id.* at 625.
12. *Id.* at 627.
13. The House Report discussing the Arbitration Act explicitly refers to this hostility:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the grounds that the courts were thereby ousted from their jurisdiction. This jealousy became firmly embedded in the English common law and was adopted with it by the American courts.

H.R REP. NO. 98, 68th Cong., 1st Sess., 1-2 (1924). The Senate Report discussing

Arbitration Act mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[14] The purpose behind the Arbitration Act was to ensure judicial enforcement of arbitration agreements.[15] The decisions of the Supreme Court subsequent to its passage solidly confirmed this purpose and firmly established the strong federal policy in favor of arbitration agreements.[16] This policy not only meant judicial enforcement of arbitration awards, it also meant that any claim coming within the arbitration provision must go to arbitration.[17]

The tension arose when Congress responded to inequities and discrimination in the workplace by enacting statutes which granted individual employees certain substantive rights.[18] These statutes provided minimum wage and hour guarantees and sought to protect individuals from discrimination in the work-

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judicial hostility cites two additional reasons for the hostility:

> The expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress, and also the doubt they entertained as to their rights to compel an unwilling party to submit this cause to such a tribunal, thus denying to him the right to submit the same to the ordinary courts of justice for hearing and determination.

S. REP. NO. 536, 68th Cong., 1st Sess., 2 (1924).

14. 9 U.S.C. § 2.

15. The longstanding judicial hostility toward arbitration agreements made legislative action necessary to accomplish the purpose of enforcing privately made arbitration agreements. According to the House Report:

> The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H.R. REP. NO. 96, 68th Cong., 1st Sess. at 1-2 (1924). The Report went on to note that the Arbitration Act was to assure that "an arbitration agreement is placed upon the same footing as other contracts, where it belongs." *Id.* at 1.

16. The Supreme Court of the United States has consistently concluded that "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985); *see e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987); Southland Corp. v. Keating, 465 U.S. 1 (1984); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

17. The Court in *Moses H. Cone* set forth the general rule that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

18. *See supra*, note 4.

place.[19] The enforcement provisions of these statutes commonly allowed a civil action in any federal or state court of competent jurisdiction for such legal or equitable relief as may be appropriate.[20] The plain language of the enforcement provisions confirms that the protection of these rights was to be vested in the courts.[21] None of these statutes mention arbitration as a possible enforcement procedure, despite its broad and effective use in the employment context.

Before the court in *Steck* could declare the claim nonarbitrable, it would be forced to deal with the tension between judicial respect for arbitration agreements and judicial protection of statutory rights.

B. *The Mitsubishi Mandate*

In *Mitsubishi*, the Supreme Court faced the issue of whether a statutory claim under the Sherman Act, which fell within the arbitration provision of a private agreement, was subject to mandatory arbitration pursuant to the Arbitration Act.[22] Mitsubishi Motors and Soler entered into a contract whereby Soler agreed to sell Mitsubishi-manufactured vehicles which were distributed under contract to Soler by Mitsubishi Motors.[23] Due to decreased sales, Soler sought to delay shipment of vehicles which was in violation of the contract.[24]

The contract between the parties provided that all disputes, controversies or differences which may arise between the parties related to the contract "shall be finally settled in arbitration."[25] Mitsubishi Motors eventually withheld shipment and brought an action in federal court to compel arbitration.[26] However, Soler sought to avoid arbitration by raising a statutory claim.[27] The

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19. *See* 29 U.S.C. § 206 (certain employees guaranteed a minimum wage); 29 U.S.C. § 207 (maximum work week established); 42 U.S.C. § 2000e-2 (employment discrimination based on sex, color, religion, race or national origin prohibited); 29 U.S.C. § 1140 (employees protected from interference with benefit rights).

20. *See infra* text accompanying note 21.

21. The FLSA explicitly states:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself and themselves and other employees similarly situated.

29 U.S.C. § 216(b). Title VII states, "a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . ." 42 U.S.C. § 2000e-5(f). ERISA states, "if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in Federal Court." 29 U.S.C. § 1440.

22. *Mitsubishi*, 473 U.S. at 614, 616.

23. *Id.* at 617.

24. *Id.*

25. *Id.*

26. *Id.* at 618.

27. *Id.* at 619-20. Soler brought a claim under the anti-trust provisions of the

district court held the statutory claim to be arbitrable due to the international character of the contract.[28] The district court so held, despite its recognition that the court of appeals had uniformly held the rights conferred by antitrust laws to be "of a character inappropriate for arbitration."[29] Accordingly, the court of appeals reversed.[30]

The Supreme Court in *Mitsubishi* reversed the court of appeals inasmuch as it precluded arbitration of the claim.[31] The Court concluded there was no reason to depart from the strong federal policy favoring arbitration agreements.[32] The Supreme Court noted its prior observation that "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate".[33] The Court held the agreement to arbitrate as enforceable in accord with the explicit provisions of the Arbitration Act.[34]

Sherman Act, alleging that Mitsubishi and the parent company "had conspired to divide markets in restraint of free trade." *Id.* Soler then argued it could not be compelled to arbitrate a statutory claim not mentioned in the arbitration agreement. *Id.*

28. *Id.* at 616-17. The parties to the contract calling for arbitration were Mitsubishi Motors Corporation, a Japanese corporation, Chrysler International, S.A., a Swiss corporation, and Soler Chrysler-Plymouth, Inc., a Puerto Rico corporation. The agreement called for arbitration in Japan. *Id.* In holding the agreement enforceable due to the international character of the contract, the district court relied on a prior Supreme Court decision in Scherk v. Alberto-Culver Co., 417 U.S. 508 (1974). *Id.* at 621. In *Scherk*, an American company, Alberto-Culver, purchased business enterprises from Scherk, a German citizen, under a contract with an arbitration clause providing for arbitration of controversies in Paris, France. *Scherk*, 417 U.S. at 511. The American company filed suit in Illinois. The Supreme Court enforced the agreement and required Alberto-Culver to arbitrate in Paris. *Id.* The Court reasoned:

> A contractual provision specifying in advance the forum in which a dispute shall be litigated and the law to be applied is . . . an almost indispensible precondition essential to any international business transaction.
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreement.

Id. at 516-517.

29. *Mitsubishi*, 473 U.S. at 620-21 n.9.

30. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 723 F.2d 155, 169 (1st Cir. 1983).

31. *Mitsubishi*, 473 U.S. at 640.

32. *Id.* at 626.

33. *Id.* at 625-26.

34. *Id.* at 640. The Court stated "we require this representative of the American business community to honor its bargain . . . by holding this agreement to arbitrate 'enforce[able] in accord with the explicit provisions of the Arbitration Act.' " *Id.* The Court relied on the international character of the agreement and its reasoning in

The Court rejected Soler's allegation that statutory claims were nonarbitrable absent an express agreement to arbitrate those specific claims.[35] Instead, the Court found "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."[36] This general rule, referred to as the "*Mitsubishi* mandate" in *Steck*, was not to be interpreted as saying all controversies involving statutory rights were suitable for arbitration.[37] However, the mere fact the claim was statutory in nature did not indicate it was unsuitable for arbitration.[38]

The Court adopted a two-step analysis as the process to be used in determining whether a statutory claim was arbitrable.[39] First, the court must determine "whether the parties' agreement to arbitrate reached the statutory issue."[40] Second, "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims."[41] The second step involves an analysis of the Congressional intent behind the statute to determine if Congress

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Scherk in reaching this holding. The Court concluded, "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement." *Id.* at 629.

35. *Id.* at 625. Soler argued that "as a matter of law a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs 'unless [that party] has expressly agreed' to arbitrate those claims." *Id.* The Court interpreted Soler's argument to mean "that the arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate." *Id.*

36. *Id.*

37. *Id.* at 627. The Court stated:

> That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation to ferret out the inappropriate. Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Id.

38. *Id.* at 625-26. The Court clearly rejected the argument that statutory claims were nonarbitrable simply because they were statutory in nature. The Court found no "presumption against arbitration of statutory claims" and no basis in the Arbitration Act itself "for disfavoring agreements to arbitrate statutory claims." *Id.*

39. *Id.* at 628.

40. *Id.* The first step involves the question of whether the parties agreed to arbitrate the dispute. The court must determine whether the arbitration clause encompasses the dispute at issue. The Court applied the strong federal policy of resolving any arbitrability issues in favor of arbitration to statutory claims, and stated that "the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Id.* at 627.

41. *Id.* at 628.

sought to include protection against waiver of a right to the judicial forum.[42] After *Mitsubishi*, any statutory claim is subject to the general rule unless the court finds it fails one of the steps in the analysis.[43]

The court in *Steck* would be forced to deal with the *Mitsubishi* mandate which refused to find a presumption against arbitration of statutory claims in the Arbitration Act.

III. THE CASE

Robert Steck was hired by the firm of Smith Barney, Harris Upham & Co. in November of 1973 as an account executive.[44] Pursuant to the rules of the New York Stock Exchange, Steck executed an application and agreement for approval as a registered representative of Smith Barney.[45] This standardized agreement stated that any controversy between the plaintiff and defendant arising out of the termination of his employment shall be settled by arbitration.[46] On September 29, 1984, Smith Barney terminated the plaintiff's employment.[47]

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42. *Id.* The Court noted:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id.

43. In its most recent decision regarding the arbitrability of statutory claims, the Supreme Court has confirmed the validity of the Mitsubishi reasoning. *See Shearson/American Express*, 107 S. Ct. at 2332 (decided June 8, 1987). The Court considered whether claims under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act were arbitrable. *Id.* at 2335. The Court affirmed the general rule that there is no presumption against arbitrability of statutory claims by stating the Arbitration Act "mandates enforcement of agreements to arbitrate statutory claims." *Id.* at 2337. The Court looked to the two-step analysis and noted that to defeat the general rule, the party resisting arbitration "must demonstrate that Congress intended to make an exception to the Arbitration Act . . . an intention discernible from the text, history, or purposes of the statute." *Id.* at 2338.

44. *Steck*, 661 F. Supp. at 543.

45. *Id.*

46. *Id.* at 544. Specifically, the agreement stated:

> Any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and rules then obtaining of the New York Stock Exchange, Inc.

Id.

47 *Id.*

Steck filed suit in federal district court alleging that the termination constituted unlawful discrimination based on age in violation of the ADEA.[48] Smith Barney moved the court pursuant to the Arbitration Act to require arbitration of the ADEA claim.[49] Smith Barney argued that the text and legislative history of the ADEA did not indicate Congressional intent to exempt ADEA claims from the Arbitration Act.[50] The court relied on the two-step analysis set forth in *Mitsubishi* in determining whether the ADEA claim was arbitrable.[51] Based on this framework, the court reasoned that "a statutory claim is 'arbitrable'—that is, capable of being subject to arbitration by the parties' prior agreement—unless there is a congressional intention, 'deductible from text or legislative history' to the contrary."[52] The court examined the text and legislative history of the ADEA and statutes upon which it was modeled and found congressional intent to preclude waiver of judicial remedies.[53] Based on this finding and judicial precedent involving analogous statutory schemes, the court concluded that the plaintiff's ADEA claim was nonarbitrable.[54]

IV. THE DECISION

The critical part of the court's decision involved step two of the *Mitsubishi* framework.[55] The court examined the text and legislative history of the ADEA and judicial precedent involving statutory rights with similar enforcement procedures in an effort to determine whether Congress intended to preclude a waiver of judicial remedies.[56]

A. *Text and Legislative History of the ADEA*

The ADEA was enacted to promote the employment of older persons and to prohibit arbitrary age discrimination.[57] The procedures to be used in enforc-

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48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 544-45.
53. *Id.* at 547.
54. *Id.* at 546-47.
55. The court only briefly discussed step one finding the claim to be within the scope of the arbitration clause in the contract. *Id.* at 545.
56. *Id.* at 545-46.
57. *See* 29 U.S.C. § 621. The explicit purpose of the ADEA is, "[t]o promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."*Id.*; *see* H.R. REP. No. 805, 90th Cong., 1st Sess., reprinted in 1967 U.S. CODE CONG. & ADMIN NEWS 2214.

ing the ADEA were seriously debated by Congress.[58] Congress was presented with various bills which suggested enforcement schemes similar to those found in the National Labor Relations Act[59] (hereinafter NLRA), the Fair Labor Standards Act[60] (hereinafter FLSA), and Title VII of the Civil Rights Act[61] (hereinafter Title VII). The final bill as passed contained an enforcement scheme similar to that found in the FLSA.[62] The text of the ADEA itself explicitly states it is to be enforced in accordance with the powers, remedies, and procedures provided in the FLSA.[63] Specifically, the ADEA authorizes the Equal Employment Opportunity Commission or the aggrieved employee to bring a civil action "for such legal or equitable relief as will effectuate the purposes of this chapter."[64]

The court in *Steck* interpreted the text and legislative history of the

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58. *See* Lorillard v. Pons, 434 U.S. 575, 577-78 (1978).

59. *Id.* at 577. The Johnson Administration presented a bill with an enforcement scheme similar to the NLRA. On January 23, 1967, President Johnson spoke to Congress in support of an age discrimination bill. In that speech, he suggested a bill which would be enforced through a law providing for "conciliation, and if necessary, enforcement through cease and desist orders, with court review." CONG. Q. ALMANAC, 30-A (1967). Pursuant to this speech, the Secretary of Labor introduced the Administration bill granting power to the Secretary of Labor to enforce the provisions by issuing cease and desist orders subject to judicial review, but with no private right of action. *See Lorillard*, 434 U.S. at 578; *See also*, 113 CONG. REC. 1377 (1967). This scheme is similar to that found in § 10(c) and § 10(e) of the NLRA.

60. *See Lorillard*, 434 U.S. at 577-78. Senator Javits introduced Senate bill 788 which placed enforcement within the Department of Labor while also allowing the aggrieved individual to bring a civil action. *See* 113 CONG. REC. 7076-7077 (1967). As originally introduced, the bill placed enforcement in the hands of the Wage and Hour division of the Department of Labor and permitted court action by either the Department of Labor or the aggrieved party. *Id.*; *see also* S. REP. NO. 723, 90th Cong., 1st Sess. 13 (1967) (remarks of Senator Javits on S. 788). This scheme was essentially the one set forth in the FLSA. In describing the enforcement scheme finally adopted in the ADEA, Senator Javits stated "the enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act, in fact [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of [the FLSA]." 113 CONG. REC. 31254 (1967).

61. *See Lorillard*, 434 U.S. at 578.

62. *See* Pub. L. 90-202, § 7, 81 Stat. at 604.

63. *See* 29 U.S.C. § 626(b). The bill states that "the provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof) and 217 of this title." *Id.*

64. *Id.* at 626(b) & 626(c). It should be noted that the original administration and enforcement of the ADEA was vested in the Department of Labor. However, pursuant to section 2 of Reorganization Plan No. 1 of 1978, 43 F.R. 19807 (1978), *reprinted in* 42 U.S.C. app. at 38 (1978), *and in* 92 Stat. 3781 (1978), administration and enforcement was transferred to the Equal Employment Opportunity Commission, effective July 1, 1979.

ADEA as granting broad access to the courts.[65] The court reasoned that clear Congressional intent to provide this access would be violated by forcing these claims into arbitration.[66] Specifically, the court reasoned that the broad range of relief permitted by the ADEA indicated arbitration would fail to vindicate the rights guaranteed by the ADEA.[67] This broad range of relief was necessary to effectively secure the rights under the ADEA.[68] The court concluded this relief was beyond an arbitrator's authority so that arbitration could not effectively secure rights as Congress intended.[69] These textual and historical factors indicated to the court that Congress intended to preclude a waiver of judicial remedies under the ADEA.[70]

B. *Prior Precedent Involving Analogous Statutes*

The essence of the court's decision rests firmly on the recognition that important similarities exist between the ADEA and both the FLSA and Title VII.[71] The importance of this recognition is that the Supreme Court had ear-

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65. *Steck*, 661 F. Supp. at 545-46. The court did so by looking to the reasoning of the Supreme Court in Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981). The Supreme Court in *Barrentine* interpreted the enforcement scheme of the FLSA as guaranteeing broad access to the courts. *Id.* at 740. The court in *Steck* noted the similarity in enforcement schemes between the FLSA and ADEA and reasoned that the ADEA also granted broad access to the courts. *See Steck*, 661 F. Supp. at 545-46.

66. *Id.* at 546-47. The court concluded that an arbitrator "has no general authority to invoke public laws that conflict with the bargain of the parties." *Id.* at 546. The court saw the following unacceptable result if claims were forced into arbitration:

> Therefore [since the arbitrator cannot invoke public laws], if required to arbitrate his ADEA claims, plaintiff risks having his statutory rights subordinated to the terms of the contract in contravention of the ADEA's purpose. In the alternative, if the arbitrator bases his decision upon the substantive guarantees of the ADEA exclusively, the arbitrator has exceeded the scope of his authority, which may render his decision null and void. Under either scenario, compelling arbitration fails to vindicate the rights guaranteed by the ADEA in contravention of Congressional intent.

Id. at 546-47.

67. *Id.* at 546. The broad range of relief is found in the language of the ADEA wherein it permits "such legal or equitable relief as may be appropriate." 29 U.S.C. § 626(b). The court stated that such relief would include injunctive relief as necessary to protect rights under the ADEA. *Steck*, 661 F. Supp. at 546. This relief would be outside the arbitrator's authority so that full rights under the ADEA could not be protected. *Id.*

68. *Id.* at 546.

69. *Id.* Specifically, the court only mentioned injunctive relief as outside the arbitrator's authority. *See supra*, note 63.

70. *Steck*, 661 F. Supp. at 547.

71. *Id.* at 545. The court states:

> Though the Supreme Court has not addressed the arbitrability of the ADEA

lier decided cases involving arbitrability under FLSA and Title VII while no ADEA case had yet been decided.[72] The Supreme Court concluded in both cases that judicial remedies were not precluded by arbitration.[73] The Court based this conclusion on two basic findings. First, the statutes vested final responsibility for enforcement of these statutory rights with the courts so that deferral to arbitration would violate this intention.[74] Second, arbitration would be an inadequate forum to secure rights under these statutes.[75] The court in *Steck* would rely heavily on these conclusions in reaching its decision.

The Title VII case relied on by the court was *Alexander v. Gardner-Denver Co.*[76] The issue before the Court was whether submission of an employee's claim to arbitration would preclude a statutory right to trial de novo under Title VII.[77] A claim of discharge without just cause based on racial discrimination was submitted to arbitration and decided adversely to the employee.[78] The employee filed suit in district court alleging racial discrimination in violation of Title VII.[79] The district court found and the court of appeals affirmed that the employee "was bound by the arbitral decision and thereby precluded from suing his employer under Title VII."[80]

In a unanimous decision, the Supreme Court reversed and held "rights under Title VII are not susceptible to prospective waiver."[81] The Court reasoned that the text of Title VII clearly vested full and final responsibility for its enforcement in the courts so that deferral to arbitration would violate that goal.[82] The Court also observed that "legislative enactments in this area have

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> under the Federal Arbitration Act, the Court's precedent pertaining to these analogous statutory schemes [FLSA and Title VII] supports the conclusion that suits alleging violation of substantive rights conferred by ADEA can be brought in federal court notwithstanding an agreement to arbitrate.

Id. The court noted similarities in their aims, substantive provisions, and enforcement procedures. *Id.*; *see supra*, note 4.

72. The Title VII case referred to by the court is Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); the FLSA case is *Barrentine*, 450 U.S. at 728.

73. *See* 415 U.S. at 51; 450 U.S. at 746.

74. *See id.* at 45; 450 U.S. at 740-41.

75. *See id.* at 48-55; 450 U.S. at 742-46.

76. *Alexander*, 415 U.S. at 36.

77. *Id.* at 38-39.

78. *Id.* at 42.

79. *Id.* at 43.

80. *Id.*

81. *Id.* at 51-52.

82. *Id.* at 45-46. The Court noted that "the Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices." *Id.* at 44; *see also* 42 U.S.C. § 2000e-5(f) (civil action may be filed by Commission or aggrieved employee) and § 2000e-5(g) (court may issue injunctive relief). The Court determined that "these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII." *Alexander*, 415 U.S. at 45. The Court found nothing in the text of Title

long evinced a general intent to accord parallel or overlapping remedies against discrimination."[83] This intent suggests that submission to one forum does not preclude a later submission to another, but rather, that the differing forums are designed to supplement not supplant one another in order to promote the policies underlying each system.[84] Finally, the Court reasoned that "arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[85] The specific role of the arbitrator and the limitations placed on arbitration cause them to be inappropriate.[86]

The court in *Steck* relied on the analysis of the Supreme Court by which it concluded that deferral to arbitration would be inconsistent with Congress' intent of vesting final enforcement responsibility with the courts.[87] The enforcement provisions are similar so that the court in *Steck* reasoned if Congressional intent under Title VII precluded a waiver of judicial remedies, similar language in the ADEA would do the same.[88]

The court in *Steck* also looked to the Supreme Court's conclusion in *Alexander* that arbitration would be an inappropriate forum for protection of these rights.[89] Specifically, the court noted that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties."[90] This limitation on the arbitrator suggests that either an ADEA claim will be subordinated to the terms of a contract, or an arbitrator's decision based on ADEA provisions will be null and void as outside the scope of his authority so that "compelling arbitration fails to vindicate the rights guaranteed by the ADEA in contravention of Congressional intent."[91] Finally, re-

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VII to suggest "that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Id.* at 47.

83. *Id.* The Court found that Title VII provided for enforcement of its provisions in several different forums, including the Equal Employment Opportunity Commission, state and local agencies, and federal courts. *Id.*

84. *Id.* at 48-50. The differing forums for enforcement led the Court to conclude that Title VII "strongly suggest[s] that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.* at 50.

85. *Id.* at 56.

86. *Id.* at 52-58. Specifically, the Court pointed to the arbitrator's inability to invoke public laws, his mandate to follow the contract, his specialized knowledge of the law of the shop only, and the inferior factfinding of arbitration, i.e. record not as complete in arbitral proceedings, rules of evidence do not apply, procedural aspects of trial such as discovery, compulsory process, cross-examination, and testimony under oath are limited or unavailable. *Id.*

87. *Steck*, 661 F.Supp. at 545.

88. *Id.*

89. *Id.* at 546.

90. *Id.*

91. *Id.* at 545-47

garding nonarbitrability, the court interpreted *Alexander* as finding Title VII claims to be exempt from the Arbitration Act and hence nonarbitrable due to the text granting courts full enforcement power over Title VII.[92] The court in *Steck* noted these same textual indications are found in the ADEA and looked to this reasoning in finding ADEA claims nonarbitrable.[93]

The FLSA case relied on by the court was *Barrentine v. Arkansas-Best Freight System, Inc.*[94] The issue before the Supreme Court was whether an employee may bring a court action alleging a violation of the FLSA after having unsuccessfully submitted that exact claim to a grievance committee.[95] The lower courts concluded the claim was barred by being voluntarily submitted to arbitration and, therefore, the courts refused to consider the FLSA claim.[96]

The Supreme Court reversed for essentially the same reasons given in *Alexander*.[97] The broad access to the courts granted by the FLSA and the reality that arbitration would be an inadequate forum for vindication of those rights caused the Court to again conclude that judicial remedies were not precluded by prior submission to arbitration.[98] The Court mentioned several reasons why FLSA rights would be lost if submitting a claim to arbitration precluded a later court action.[99] For instance, the union may fail to support the claim properly due to majoritarian reasons;[100] the arbitrator may lack competence to decide the ultimate legal issues;[101] the arbitrator has no authority to invoke public laws that would conflict with the contract;[102] the arbitrator is to uphold the contract, not statutory law;[103] the arbitrator cannot grant the broad range of relief often required.[104] The Court held that arbitration did not pre-

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92. *Id.* at 546.

93. *Id.* at 546-47. This finding was critical to the court as it noted the conclusion of nonarbitrability in *Alexander* was in line with *Mitsubishi*. *Id.* at 547.

94. 450 U.S. at 728.

95. *Id.* at 730-31.

96. *Id.* at 735. The court of appeals concluded that "wage and hour disputes arising under the FLSA . . . may be the subject of binding arbitration where the collective bargaining agreement so provides . . . at least in situations in which employees knowingly and voluntarily submit their grievances to arbitration under the terms of the agreement." *Id.*

97. *Id.* at 739-46.

98. *Id.* at 745-46.

99. *Id.* at 742-45.

100. *Id.* The court reasoned that a union's objective is to benefit the group as a whole, not individual employees, so that individual rights would be inadequately protected. *Id.*

101. *Id.* at 743.

102. *Id.* at 744.

103. *Id.*

104. *Id.* at 745. Specifically, the Court noted an arbitrator could not award liquidated damages, costs or attorney's fees while a court is authorized to do so under the FLSA. *Id.*, *see also* 29 U.S.C. § 216(b) (aggrieved employee explicitly permitted to

clude a later court action "because Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial forum rather than in an arbitral forum."[105]

The court in *Steck* relied most heavily on the *Barrentine* decision because of the clear intent of Congress that the ADEA be enforced in accordance with the provisions of the FLSA.[106] The clear decision in *Barrentine* was that FLSA rights are not waivable as the enforcement scheme provided by the FLSA granted broad access to the courts and the protection of these rights required a judicial rather than an arbitral forum.[107] Because of the unequivocal similarities in enforcement schemes, it was a short step for the court in *Steck* to "deduce an implicit non-waiver intent from the ADEA's text and legislative history."[108] Regarding nonarbitrability, the court interpreted *Barrentine* as finding FLSA claims to be "exclusively judicially enforceable" and hence nonarbitrable due to the text granting broad remedial power to the courts.[109] It was again a short step for the court to find ADEA claims nonarbitrable by relying on similar textual indications in the ADEA.[110]

In addition to Supreme Court precedent involving analogous statutory schemes, the court in *Steck* looked to a decision by the Court of Appeals for the Third Circuit involving federal statutory rights under the Employee Retirement Income Security Act of 1974[111] (hereinafter ERISA). In *Zipf v. American Telephone & Telegraph Co.*,[112] the plaintiff was discharged for excessive absenteeism one day before she would have qualified for substantial benefits under the defendant's benefit plan.[113] The plaintiff filed suit under Section 510 of ERISA which protected employees from interference with ben-

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recover liquidated damages, costs and reasonable attorney's fees in a court action).

105. *Id.* at 746.

106. *Steck*, 661 F. Supp. at 546. This reliance is explicit in the opinion when the court states by "reading *Barrentine* in conjunction with the Supreme Court's holding in *Lorillard, supra*, requiring that the ADEA be enforced in accordance with the procedures and remedies in the FLSA, this court deduces an implicit non-waiver intent from the ADEA's text and legislative history." *Id.*

107. *Id.*

108. *Id.*

109. *Id.* The importance of this finding was that the court in *Steck* concluded this was in line with *Mitsubishi*.

110. *Id.* at 546-47.

111. 29 U.S.C. § 1001 (1974).

112. 799 F.2d 889 (3d Cir. 1986).

113. *Id.* at 890. The plaintiff was diagnosed as having rheumatoid arthritis which occasionally caused her to be absent from work. The terms of the employer's plan specified that under disability benefits, an employee would be entitled to those benefits on the eighth calendar day of absence from work. During the period of the illness that led to her discharge, the plaintiff had been absent from work seven days when she was notified she would be discharged. *Id.*

efit rights and provided for suit in federal court to protect those rights.[114] The issue before the court was "whether a participant in a federally regulated employee benefits plan must exhaust internal administrative remedies before filing suit in federal court for alleged interference with her statutory rights."[115]

The court held that no exhaustion of administrative remedies was necessary before filing suit.[116] The court's reasoning was three-fold. First, the legislative history of Section 510 and the explicit language of the Section indicate Congressional intent to provide protection of ERISA rights by the courts.[117] Second, statutory interpretation is a matter within the court's expertise so that the need for deference to administrative expertise is absent.[118] Third, judicial resolution provides a "consistent source of law" to guide employer actions and thereby secure employee rights.[119]

The court in *Steck* found the analysis in *Zipf* to be instructive. The primary basis for the decision in *Zipf* rested on the text and legislative history of the pertinent statutory section.[120] This same analysis was followed in *Steck*.[121] In addition, the court in *Steck* looked to another part of the analysis in *Zipf* and found a justification for nonarbitrability not mentioned in *Alexander* or *Barrentine*. The court in *Zipf* pointed to Congressional interest in judicial resolution as necessary to provide a "consistent source of law to help plan fiduciaries and participants predict the legality of proposed actions."[122] The court in *Steck* applied this same consideration to the ADEA and concluded the Congressional intent to prevent age discrimination in employment "requires the development of a consistent body of judicial precedent to guide employer actions."[123] The importance of the decision in *Zipf* for the court in *Steck* went beyond the *Zipf* court's reasoning, however, as the court noted the *Zipf* decision had been reviewed in light of *Mitsubishi* and the analysis was held not in contravention of *Mitsubishi*.[124] This gave the court in *Steck* Third Circuit pre-

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114. *Id.*; *see also* 29 U.S.C. § 1140 (protection provided from interference with benefit plan) and § 1451 (aggrieved employee permitted to bring civil action).

115. *Zipf*, 799 F.2d at 889.

116. *Id.* at 894.

117. *Id.* at 892 n.3. The court noted that in the discussion of the bill, the remedy for Section 510 was to be provided by the courts. The court quoted from the legislative history of the bill wherein Senator Javits affirmed an aggrieved individual would have to go to court to seek a remedy. *Id.*

118. *Id.* at 893.

119. *Id.*

120. *See supra*, note 111.

121. *Steck*, 661 F. Supp. at 547. The court in *Steck* specifically mentioned the *Zipf* court's reliance on text and legislative history and noted that the same intent to provide judicial access was found in the ADEA. *Id.*

122. *Zipf*, 799 F.2d at 893.

123. *Steck*, 661 F. Supp. at 547.

124. *Id.* The *Zipf* decision was reviewed by the court in Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987). In reviewing the *Zipf* decision in the light of

cedent, in line with *Mitsubishi*, which held that other remedial procedures need not be exhausted before seeking relief in federal court.

In summary, the court in *Steck*, by looking to the text and legislative history of the ADEA and judicial precedent in *Alexander*, *Barrentine*, and *Zipf*, concluded not only that prior arbitration did not preclude further judicial action, but also that claims under the ADEA were nonarbitrable so that a party could not be compelled to arbitrate an ADEA claim.[125] The court discussed three reasons for this decision. First, the text and legislative history of the ADEA grants broad access to the courts which would be violated if claims were forced into arbitration.[126] Second, the inability of arbitration to fully vindicate the rights guaranteed by the ADEA make it inappropriate for ADEA claims.[127] Third, the need for a body of judicial precedent to guide employers so that ADEA rights are uniformly protected.[128]

V. ANALYSIS

The decision in *Steck* would have been uneventful had the court been able to limit its holding to a finding that prior arbitration does not preclude further judicial action. The precedent in *Barrentine* alone would confirm this conclusion. However, the factual situation presented to the court made it necessary for the court to determine whether rights under the ADEA could be brought in federal court notwithstanding a prior agreement to arbitrate. Faced with this issue, the court concluded that ADEA claims were nonarbitrable, that is, not capable of being subjected to arbitration.[129] It is this conclusion that makes the decision in *Steck* problematic. The conclusion is improper if the reasoning used by the court is in conflict with the *Mitsubishi* mandate.

The court's discussion of the text and legislative history of the ADEA may be in contravention of the *Mitsubishi* mandate.[130] For the court to conclude that ADEA claims are nonarbitrable, it must find that Congress in-

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Mitsubishi, the court in *Gavalik* stated, "the Zipf court did not resort to a presumption of unarbitrability, but rather sought to ascertain Congressional intent on the question of the arbitrability of substantive discrimination claims under § 510 of ERISA." *Id.* at 850. The court noted this approach did not contravene the two-step analysis found in *Mitsubishi*. *Id.*

125. *Steck*, 661 F. Supp. at 547.

126. *Id.* at 545-546.

127. *Id.*

128. *Id.* at 547.

129. *Id.*

130. To avoid a conflict with *Mitsubishi*, the analysis in *Steck* must reflect adherence to the general rule in *Mitsubishi* that there is no presumption against the arbitrability of statutory claims. *Mitsubishi*, 473 U.S. at 625. As an indication of this adherence and in an effort to rebut the presumption so that the mandate of the Arbitration Act can be avoided, the court must look to the statute and find that Congress itself intended ADEA claims to be nonarbitrable. *Id.* at 628.

tended to foreclose the use of arbitration.[131] Since the text of the ADEA nowhere forecloses the use of arbitration, it is the necessity of finding this specific intent that makes the *Steck* holding questionable. The court looked to the reasoning in *Alexander* and *Barrentine* and inferred this intent from the ADEA's granting broad access to the courts and a broad range of remedial relief available only in the courts.[132] It is this inference which may contravene *Mitsubishi*.

The inference is problematic in that it is based on a misplaced reliance on *Alexander* and *Barrentine*. Neither case deals with whether statutes with similar enforcement schemes to that found in the ADEA foreclose the use of arbitration. The issue of nonarbitrability was not before the court. Both cases involved whether prior arbitration precluded subsequent judicial action.[133] The Supreme Court's conclusion in these cases should be limited to a finding that a statutes broad grant of judicial access with judicially enforceable remedies assures judicial remedies despite prior arbitration.[134]

The court in *Steck* misinterprets both *Alexander* and *Barrentine* when it suggests that textual provisions similar to those found in the ADEA indicate Congressional intent rendering FLSA and Title VII claims nonarbitrable.[135] The precise issue before the court makes such a conclusion without support. While these textual provisions may indicate a clear intent to preclude a waiver of judicial remedies, it proves too much to infer the intent to foreclose the use

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131. *See Mitsubishi*, 473 U.S. at 628. It is only the finding of this specific intent in the text of the ADEA that would satisfy *Mitsubishi* and exempt the claim from the mandate of the Arbitration Act.

132. *Steck*, 661 F. Supp. at 545-47. The court saw in these textual provisions the implication that arbitration should be foreclosed.

133. *See Alexander*, 414 U.S. at 39; *Barrentine*, 450 U.S. at 730-31.

134. *See* 415 U.S. at 60; 450 U.S.at 740. The reliance in *Steck* is hence misplaced in that the court attempts to stretch the rather specific and limited holdings in *Alexander* and *Barrentine* to cover a different factual situation.

135. *Steck*, 661 F. Supp. at 546. The court states as follows:

> In finding that Congress intended the judicial access guaranteed by Title VII and FLSA to be inviolate, thereby rendering these claims non-arbitrable under Mitsubishi, the Supreme Court relied on various statutory indicators also present in the text and legislative history of the ADEA. For example, the Court pointed to the legislative mandate granting courts plenary enforcement power over Title VII as an indication of Congressional intent to exempt Title VII claims from the Arbitration Act. . . . The Supreme Court reasoned that in granting courts broad authority to order 'such [remedial] affirmative action as may be appropriate' Congress clearly intended Title VII [should be FLSA rights] to be exclusively judicially enforceable.

Id. These conclusions by the court in *Steck* are misleading. The Supreme Court did not in either *Alexander* or *Barrentine* conclude that FLSA or Title VII claims were nonarbitrable. This was not the issue before the Court. The Court nowhere states that Title VII claims are exempt from the Arbitration Act. Nor does the Court state that FLSA claims are to be exclusively judicially enforced. *Id.*

of other remedial processes. The intent to preclude a waiver of judicial remedies does not prove that arbitration is foreclosed.[136] Furthermore, in *Alexander*, the Court explicitly affirmed that a party could pursue either forum without preclusion from the other.[137]

While the analysis in *Alexander* and *Barrentine* may be instructive, it is not dispositive of whether the text and legislative history of the involved statutes foreclose the use of arbitration. The court in *Steck* takes the sound reasoning in these cases and tries to make it support a conclusion beyond their scope. The intent to preclude a waiver of judicial remedies is not the same as the intent to foreclose arbitration. The defendant in *Steck* attempted to raise the limited value of these cases due to the differing statutes and issues, but the court dismisses this attempt by implying that its decision was based on an independent interpretation of Congressional intent relative to the ADEA and was, therefore, not in contravention of *Mitsubishi*.[138] Unfortunately for the court, this conclusory statement is not strengthened by the reasoning found in the opinion. The court's finding of nonarbitrability is not supported by either the text or legislative history of the ADEA or the reasoning in the Supreme Court cases on which it so heavily relies.

The court's discussion of the adequacy of arbitration as a reason for holding ADEA claims nonarbitrable may likewise be in contravention of *Mitsubishi*. The Court in *Mitsubishi* observed "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[139] In accordance with this observation, the Court rejected arguments for nonarbitrability of statutory claims based on the inadequacy of arbitration. The potential complexity of the claim, the streamlined

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136. In essence, the court in *Steck* tries to take reasoning which supports one conclusion and apply it to prove a totally different conclusion. The court fails to adequately take into consideration the difference between finding intent to preclude and intent to foreclose.

137. *Alexander*, 415 U.S. at 52.

138. *Steck*, 661 F. Supp. at 546. The defendant relied on a separate opinion by Judge Adam's in Jacobson v. Merrill Lynch, Pearce, Fenner & Smith, 797 F.2d 1197 (3d Cir. 1987). Judge Adams, in considering whether statutory claims were subject to arbitration, saw *Barrentine* and *Alexander* as limited by *Mitsubishi's* rule that no presumption against arbitrability exists so that "[a]t most, those cases may be seen as construing the intent underlying the particular statutes at issue, or as a rule of preclusion and not of arbitrability, or perhaps as a special presumption against labor arbitrators because of their limited expertise outside the labor field." *Id.* at 1207. In dismissing the defendant's argument, the court in *Steck* looked to another Third Circuit decision dealing with the Jacobson decision. The Third Circuit concluded that neither *Mitsubishi* nor *Jacobson* would be violated as long as the arbitrability of federal statutory claims was based on statutory interpretation and not "judicially recognized public policy." *Gavalik*, 812 F.2d at 850.

139. *Mitsubishi*, 473 U.S. at 626-27.

procedures of arbitration, and the fear that arbitration will not follow the law and thereby fail to protect the substantive rights were rejected by the Court as evidence of nonarbitrability.[140] The clear mandate in *Mitsubishi* is that it is the intent found in the text of the statute, not the logical conclusions of the courts regarding the adequacy of arbitration, that is determinative.[141] The reasoning of the court in *Steck* that the failure of arbitration to fully vindicate the rights guaranteed by the ADEA is in conflict with *Mitsubishi.*

The court may have again mistakenly relied on *Alexander* and *Barrentine.* The validity of considering the adequacy of arbitration may be justified in *Alexander* and *Barrentine* because of the precise issue before the Court. The Court considered whether judicially guaranteed access and remedies could be lost by prior arbitration. The ability of arbitration to vindicate statutory rights becomes critical if judicial access is to be precluded by prior arbitration as the Congressional intent to provide a judicial forum with its attendant protection and enforcement would clearly be violated.[142] However, where the statute does not foreclose the use of arbitration, the Supreme Court has refused to violate the agreement to arbitrate based on the inadequacy of arbitration.[143] A finding of nonarbitrability based on the inadequacy of arbitration places the court in contravention of the *Mitsubishi* mandate.

The court briefly refers to one other reason in support of its finding of nonarbitrability. The court states that "the realization of Congress' intent . . . requires the development of a consistent body of judicial precedent to guide employer actions."[144] There is no support in the legislative history of the ADEA for this statement, and it is a bold assumption that a "consistent" body of judicial precedent will develop and aid in securing rights under the

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140. *Id.* at 634-36.

141. *Steck*, 661 F. Supp. at 544. The court noted that determining the arbitrability of statutory claims is a matter of statutory interpretation and is not to be based on "judicially recognized public policy." *Id.* However, the court's analysis indicates it is relying to some extent on judicially recognized public policy regarding the adequacy or arbitration.

142. *See Alexander*, 415 U.S. at 45; *Barrentine*, 450 U.S. at 740-41. The important consideration in determining whether the adequacy of arbitration is relevant is Congressional intent in the statute. If the statute expresses the intent to provide a judicial forum, the adequacy of arbitration is relevant in considering whether an individual is precluded from bringing a judicial action. If the use of arbitration does not afford the type of protection given by the courts, it could be argued that congressional intent to provide judicial remedies is violated.

143. *See Mitsubishi*, 473 U.S. at 632-37. Furthermore, the Supreme Court in *Shearson/American Express* noted that the mistrust of arbitration that formed the basis for earlier decisions "is difficult to square with the assessment of arbitration that has prevailed since that time." *Shearson/American Express*, 107 S.Ct. at 2341. It is the strong national policy in favor of arbitration that makes the adequacy of arbitration unacceptable in a determination of whether arbitration is foreclosed.

144. *Steck*, 661 F. Supp. at 547.

ADEA. Furthermore, it is Congressional intent as found in the text of the statute that is critical and not the "realization" of Congressional intent. The strength of this argument may be indicated by the court's very brief consideration of it.

VI. CONCLUSION

In essence, the court in *Steck* made a two-fold decision. The court concluded that the ADEA would preclude the waiver of judicial remedies. The validity of this decision should be unquestioned in light of Supreme Court precedent. However, the court went one step further and concluded that ADEA claims were nonarbitrable. It is this aspect of the decision that is problematic. It is questionable whether the court found the necessary intent in the statute to foreclose arbitration as required by the Supreme Court's decision in *Mitsubishi*. The court itself suggests its decision may be questionable in light of *Mitsubishi*.[145] It would not appear that the decision in *Steck* will be lasting judicial precedent on the arbitrability of ADEA claims.[146]

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145. *Id.* The court seems to imply that it may be going beyond the *Mitsubishi* decision. The court states that "[m]indful of *Mitsubishi's* mandate, this court *nevertheless concludes* for many of the same reasons offered in *Barrentine, Gardner-Denver* [*Alexander*] and *Zipf*, that plaintiff's ADEA claims are non-arbitrable." *Id.* (emphasis added).

146. However, two other jurisdictions have also considered the arbitrability of ADEA claims and held that a judicial proceeding need not be stayed pending arbitration. *See* Jones v. Baskin, Flaherty, Elliot and Mannino, 670 F. Supp. 597 (D. Pa. 1987); Horne v. New England Patriots Football Club, 489 F. Supp. 465 (D. Mass. 1980).